Supreme Court of the United States

OCTOBER TERM, 1953

No. 235

GEORGE V. TAWES,
Petitioner,

v.

CIE. des MESSAGERIES MARITIMES,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Introductory Statement

This is an action at law brought by the petitioner, George V. Tawes, a compulsory Panama Canal pilot, in the United States District Court, District of the Canal Zone, Cristobal Division, to recover from the respondent, Cie. des Messageries Maritimes, damages for injuries sustained by Tawes when he fell on board the steamship *Grenoble,* on July 21, 1949. The *Grenoble* is a Liberty type vessel, then operated by respondent. The injury occurred while the vessel was tied up to the lock wall at Gatun Lock, waiting her turn to enter the chambers of that lock in the course of her transit of the Panama Canal from the Pacific to the Atlantic side.

The Pleadings

The complaint alleges (Article Seventh, R. 3), that upon arriving at the locks at Gatun, petitioner, in his capacity as pilot and in discharge of his duty, disembarked on the lock wall for the purpose of checking the ship's draft and on returning to board the vessel, and having arrived at the ship's rail, kept on descending to the ship's main deck by means of a portable step-ladder, belonging to, furnished and provided by respondent, and while on said portable step-ladder, and while so descending, said ladder slipped out from under petitioner causing him to fall on the ship's main deck and to fracture his right leg.

Article Twelfth of the complaint (R. 4-5) *specifically* charges respondent, "its agents, servants, and employees and each of them", with negligence in the following respects:

(1) "in that they failed and neglected to supply the" petitioner "with a safe means of boarding said vessel and a safe place in which to work";

(2) "failed to properly lash, fasten and secure the said step ladder";

(3) "failed to properly superintend and supervise the descending of" petitioner "on said step-ladder",

(4) "and further failed to promulgate and enforce proper and safe rules for the safe conduct of said work and to warn" petitioner "of the impending dangers."

Article Fourteenth of the complaint (R. 5) charges respondent *generally* with negligence "by reason of the dangerous and defective means provided by" respondent

"for boarding said vessel and the negligence of the" respondent, "its agents, servants and employees".

The answer of respondent pleads a general denial of negligence and alleges, in substance, that petitioner's injuries resulted entirely from his own negligence, and from his own actions outside the scope of his duties as pilot.

The Proceedings Below

The case came on for trial before the Honorable Joseph R. Hancock, District Judge, without a jury, and was heard upon the aforementioned pleadings, the testimony of petitioner and of witnesses for both parties. On August 27, 1951, the Trial Judge rendered his Opinion holding respondent liable and fixing damages in the amount of $26,076.00. Judgment for petitioner was entered accordingly, on September 10, 1951.

The opinion of the Trial Judge, which is found in the Record at pages 22-23, contains no finding of any negligence upon the part of respondent, as charged by petitioner. Liability was predicated entirely upon a misapplication of the rule of *res ipsa loquitur,* the Trial Judge stating as follows (R. 25-26):

> "When Tawes undertook to use that same ladder to reboard the ship, the ladder *from some unexplained cause* fell, throwing Tawes to floor of deck. It is testified to by members of the Canal crew and crew of the Grenoble that the ladder with Tawes on it did fall, and that he received injuries as a result thereof.
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> Under those facts, and under the elementary principles of law, the rule of Res Ipsa Loquitur applies. Under that principle of law the burden of refuting any negligence causing the ladder to fall rested on Defendant. Defendant offered no proof

> to meet that burden, and in view of such failure the liability of Defendant has been sustained". (Italics ours.)

The Circuit Court of Appeals for the Fifth Circuit, in reversing stated (R. 259):

> "The record standing thus, and in the face of a finding that the ladder fell from some unexplained cause, the District Court invoked the rule of *res ipsa loquitur* and held that under that principle of law the burden of refuting any negligence causing the ladder to fall rested on appellant. This was error.
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> The doctrine is not proof and does not supply a want of proof. * * *"

After quoting from *Sweeney* v. *Erving*, 228 U. S. 233, 240, and *San Juan Light Co.* v. *Requena*, 224 U. S. 89, 98-99, the Circuit Court of Appeals stated (R. 260):

> "We cannot say that the facts of the occurrence warrant the inference of negligence. Appellee 'did not consider the ladder unsafe'. He did not know and had no idea what caused the ladder to slide. And appellant contrary to the court's finding has met the burden of explanation by offering the ladder in evidence and by producing witnesses whose testimony tended to rebut any inference of negligence on its part.
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> "The Court below found nothing wrong with the ladder in its structure or condition, it found only that it fell from 'some unexplained cause,' and having thus found in effect that the cause of the accident and the relation of the appellant to it were matters of mere speculation and conjecture imposed liability upon the defendant solely upon the doctrine of *res ipsa loquitur*. Since we cannot on this record determine how the injury to appellee occurred—it cer-

tainly was not established why the ladder fell—we are compelled to hold that the appellee failed to sustain his burden of proving by a fair preponderance of the evidence that his injuries were attributable to appellant's negligence".

Reasons Relied Upon for Allowance of Writ

The threefold reasons which are advanced by petitioner for allowance of a Writ of Certiorari (Petition 3), none of which is tenable, are as follows:

"(1) The decision of the Court of Appeals for the Fifth Circuit is contrary to the holding of this Honorable Court in *Johnson* v. *United States*, 68 S. Ct. 391, 333 U. S. 46.

(2) The Circuit Court of Appeals for the Fifth Circuit has misapplied the cases of *Sweeney* v. *Erving*, 228 U. S. 233, and *San Juan Light Co.* v. *Requena*, 224 U. S. 89.

(3) The holding of the Fifth Circuit Court of Appeals for the Fifth Circuit in this case is contrary to the holding of the United States Circuit Court of Appeals for the Ninth Circuit in *United States Lines* v. *Cummings*, 195 Fed. 2d 291".

POINT I

The decision of the Court of Appeals for the Fifth Circuit is not contrary to the decision of this Honorable Court in *Johnson* v. *United States*, 68 S. Ct. 391, 333 U. S. 46.

Johnson was a libel in admiralty by a seaman who was injured on the SS "Mission Soledad" by a falling block. It appeared that he was assisting in securing a boom and, at the time he was injured, was engaged in an operation

known as "rounding in" blocks to bring two blocks of a block and tackle together. He was on the main deck, walking forward pulling on the hauling or "free" end, of a rope (which was attached to the block) while a shipmate, one Dudder, on the mecanno deck above and to his rear, held the block in his hands. Johnson would pull on the rope and coil the free part of the line thus accumulated, while Dudder, holding the block walked forward on the mecanno deck at a rate of speed controlled by Johnson. The rope had to be kept comparatively taut so that they would not foul. At all times before the accident Johnson had been able to pull freely on the line he was coiling and Dudder had not pulled back on the block or jerked Johnson's rope. The last thing that Johnson remembered before the accident was that he was bending over coiling the line on the deck.

The Trial Court found that Johnson had been injured by the block which was negligently and carelessly dropped by a fellow seaman. In an oral opinion the court ruled that the evidence showed *both negligence* and a case for the application of the doctrine of *res ipsa loquitur*.

The Circuit Court of Appeals modified, 160 F. (2d) 789, so as to eliminate the award of general damages on a negligence basis, allowing maintenance and cure only, stating, page 793:

> "Under these circumstances, with the actual cause of the accident totally unexplained, we cannot say that the 'facts of the occurrence warrant the inference of negligence' (Sweeney *v.* Erving, supra, note 6, page 240 of 228 U. S., page 418 of 33 S. Ct., 57 L. Ed. 815, Ann. Cas. 1914 D. 905) or '(that) the circumstances were such as to justify a finding' that the accident was the result of appellant's negligence. Jesionowski *v.* Boston & Maine Ry., supra.

"There is no presumption of negligence from mere proof of the accident (Sweeney *v.* Erving, supra, note 6, 238 of 228 U. S., 33 S. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914 D, 905. Smith *v.* United States, supra, note 4) and this is not a case where the 'circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened'. Sweeney *v.* Erving, supra, note 6, page 238 of 228 U. S., page 417 of 33 S. Ct., 57 L. Ed. 815, Ann. Cas. 1914 D. 905".

The Circuit Court of Appeals went on, page 794:

"We do not think that the falling of a block during a 'rounding in' operation is an accident which is 'ordinarily the result of negligence' such as a derailment in the Jesionowski case, supra. * * *"

This Court, in an opinion rendered by Mr. Justice Douglas, reversed. It was stated, at page 48 of 333 U. S., 92 L. Ed. 471:

"The rule of res ipsa loquitur applied in Jesionowski *v.* Boston & Maine R. R. Co. (U. S.) supra, means that 'the facts of the occurrence warrant the inference of negligence, not that they compel such an inference'. * * * *We need not determine what the result would be if it were shown that petitioner was pulling on the rope when the accident happened. For the uncontradicted evidence is that he was not pulling on the rope but was bending over coiling it on the deck.* A man who is careful does not ordinarily drop a block on a man working below him. Some external force might conceivably compel him to do so. *But where, as here, the injured person is not implicated* (Jesionowski *v.* Boston &

> Maine R. R. Co. (U. S.)), supra, the falling of the block is alone sufficient basis for the inference that the man who held the block was negligent. *In short, Dudder alone remains implicated,* since on the record either he or petitioner was the cause of the accident and it appears that petitioner was not responsible". (Italics ours.)

Mr. Justice Frankfurter in a strong dissent, in which he was joined by two other justices stated, page 53 of 333 U. S.:

> "I agree that if the rule of res ipsa loquitur determines this case, the scope of that rule is found in Sweeney *v.* Erving, 228 U. S. 233, 57 L. Ed. 815, 33 S. Ct. 416, Ann. Cas. 1914 D. 905, reaffirmed last term as a 'decision which cut through the mass of verbiage built up around the doctrine of res ipsa loquitur.' Jesionowski *v.* Boston & Maine R. R. Co., 329 U. S. 452, 457, 91 L. Ed. 416, 67 S. Ct. 401, 169 A.L.R. 947. But these two sentences are a vital part of the Sweeney Case: 'Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff'. 228 U. S. at 240. Therefore, even if the rule of res ipsa loquitur is here relevant, it should not by itself sustain a finding for the petitioner, 'for the reason that in cases where that rule does apply, it has not the effect of shifting the burden of proof.' 288 U. S. at 238. Since we cannot tell from the record how the injury to the plaintiff occurred—it was certainly not established why the block fell—I cannot escape the conclusion that petitioner failed to sustain his burden of proof by a fair preponderance of the evidence that his injuries were attributable to the defendant's negligence. • • •".

Petitioner maintains that this case is ruled by the decision in the *Johnson* case because Tawes, like Johnson, was not implicated. The true fact is however, as found by the Trial Judge (R. 23) that *Tawes was implicated.* He had one foot on the ladder and was lifting his other foot for the next step, when the ladder moved or skidded from against the gunwhale. His own movements or actions and the mere weight of his body, formed a part of the occurrence and did implicate him, as Johnson was not implicated because nothing he was doing entered into dropping of the block whereas the slipping or falling of ladders without negligence on the part of anyone is not at all unusual, and in the myriad cases involving falls from ships' ladders of all sorts no court has ever yet considered the occurrence so extraordinary as to apply the rule of *res ipsa loquitur*. The opinion of this Court in *Johnson* pointed out that it considered it unnecessary to determine "what the result would be if it had been shown that" Johnson "was pulling on the rope when the accident happened", as in this case petitioner was descending the step-ladder when his accident occurred; and specifically noted that a man who is careful does not ordinarily drop a block on a man working below him—a situation quite different from the slipping of a ladder which the injured party is descending.

The citation of *Sieracki* by petitioner in his argument under this point is irrelevant, and is an obvious belated attempt to claim the benefit of the implied warranty of seaworthiness in a seaman's contract. Petitioner made no such claim in his pleading or in the courts below, and such a claim would have been groundless in the case of a compulsory pilot such as the petitioner. Moreover, it was not, and could not have been a ground for his application for the writ of certiorari.

POINT II

The Circuit Court of Appeals for the Fifth Circuit did not misapply *Sweeney* v. *Erving*, 228 U. S. 233, or *San Juan Light Co.* v. *Requena*, 224 U. S. 89.

Petitioner charges that the Court of Appeals "obviously misapplied" *San Juan Light Company* and *Sweeney*, "as they have not taken into account this court's decision" in *Johnson*. But *Johnson* upholds *San Juan Light Company* and *Sweeney* with respect to the general principles of the rule of *res ipsa loquitur*, and is not contrary. Nowhere did the Circuit Court of Appeals hold that *res ipsa loquitur* was not applicable to the acts of a fellow servant—merely that the rule had no application to the circumstances of the case at bar. Indeed, petitioner, as a compulsory pilot, was not the fellow servant of any of the personnel of the vessel.

POINT III

The holding of the Fifth Circuit Court of Appeals for the Fifth Circuit in this case is not contrary to the holding of the United States Circuit Court of Appeals for the Ninth Circuit in *United States Lines* v. *Cummings*, 195 F. 2d 221.

Cummings may be briefly disposed of. In that case a pilot was held entitled to recover from a vessel owner for personal injuries sustained while climbing a Jacob's ladder. However, there the ship's negligence was affirmatively found, and liability was not predicated, as in the case at bar, upon a misapplication of the rule of *res ipsa loquitur*. The decisions are not in conflict.

Petitioner seems to contend that the Trial Judge should have found negligence upon the part of the boatswain's

mate of the vessel with respect to the adjustment of the ladder. The fact remains that no such a finding of negligence was made—liability having been predicated solely upon a misapplication of the rule of *res ipsa loquitur*. Indeed, the Trial Judge found that it fell from "some unexplained cause". This contention obviously now comes too late.

Petitioner also seeks belatedly and without ground to invoke *Sieracki,* in order to recover without a showing of fault. It is submitted that the granting of petitioner's application depends solely upon whether the decision of the Circuit Court of Appeals is in conflict with *Johnson* or *Cummings,* or resulted from a misapplication of *Sweeney* or *San Juan Light Co.* Clearly, no such conflict exists, and there was no such misapplication.

CONCLUSION

The application for a writ of certiorari should be denied.

Respectfully submitted,

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